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IN THE
Supreme Court of the United States

OCTOBER TERM, 1945.

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No. 795

BANKERS TRUST COMPANY, as Trustee, *et al.*,
Petitioners,

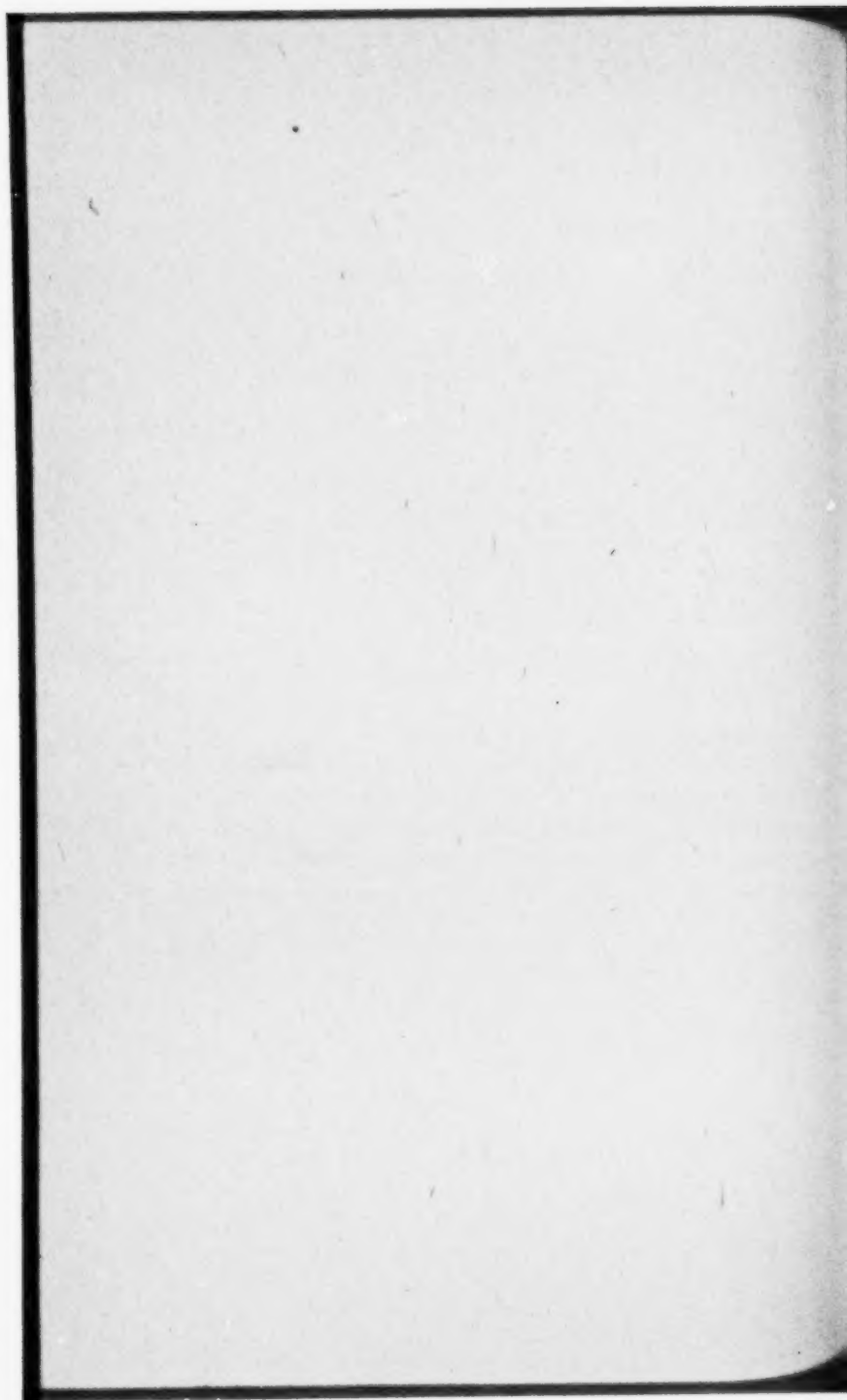
against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

**PETITION OF BANKERS TRUST COMPANY, AS TRUSTEE,
ET AL. FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.**

JESSE E. WAID,
WALTER H. BROWN, JR.,
ELBERT N. OAKES,
HAROLD L. FIERMAN,
Counsel for Petitioners.

Dated, January 31, 1946.



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against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Bankers Trust Company, Trustee, The New York Trust Company, Trustee, Raymond L. Gebhardt and Ferdinand J. Sieghardt, Debtor's Trustees and Independent Group of Bondholders, Petitioners herein, respectfully pray for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit entered November 5, 1945 (R. 121),* and the order entered thereon (R. 128) which affirmed an order of the United States District Court for the Southern District of New York (R. 6), entered in proceedings to reorganize the New York, Ontario & Western Railway Company, Debtor, under Section 77 of the National Bankruptcy Act, as amended. The latter order was entered

* (R.) with a numeral denotes a page reference to the Transcript of Record in the Circuit Court of Appeals, Second Circuit.

pursuant to the opinion of the District Court, dated March 13, 1945 (R. 12), where the Court held that the lien of The People of the State of New York, (herein called the "State"), for money advanced to the Debtor in the elimination of grade crossings, enjoyed priority over the lien of pre-existing mortgages on the Debtor's property.

Opinions Below.

The opinion of the District Court (R. 12) is not reported; the opinion of the Circuit Court of Appeals (R. 121) is reported in 151 F. (2d) 802. (*State of New York v. Gebhardt, et al.*)

Jurisdiction.

The Circuit Court of Appeals entered its order for mandate on November 5, 1945. (R. 128) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (28 U. S. C. A. §347(a))

Summary Statement of Matters Involved.

This petition involves the question whether the lien of the State of New York for money advanced to the Debtor to finance grade crossing eliminations may constitutionally outrank pre-existing mortgage liens on the Debtor's property where the statute creating the State's lien contained no provision for notice thereof to mortgagees and where no such notice was in fact given to mortgagees. The constitutional question was expressly raised in the pleadings of the Mortgage Trustees (R. 21, 71, 72, 73) and presented to the District Court and to the Circuit Court of Appeals.

Facts.

1. Bankers Trust Company, one of the Petitioners herein, is Trustee under the Debtor's Refunding Four Per Cent Gold Mortgage, dated June 1, 1892. (R. 49)

2. The New York Trust Company, one of the Petitioners herein, is Trustee under the Debtor's General Four Per Cent Gold Mortgage, dated May 31, 1905. (R. 49)

3. The District Court of the United States for the Southern District of New York in its opinion dated March 13, 1945 (R. 12, 20) directed the entry of an order conferring upon the State's claim priority over the mortgages hereinabove mentioned and denying the contention of the Mortgage Trustees that the Grade Crossing Elimination Act was unconstitutional if construed to require the subordination of said mortgage liens.

4. The order entered on April 25, 1945 (R. 6) decreed that the priority of the State's lien over the mortgages applied both to instalments past due (R. 8, 9) and to future instalments (R. 10), and rejected the contention of unconstitutionality referred to in "3" above.

5. The opinion of the Circuit Court of Appeals for the Second Circuit affirmed the District Court's order. (*State of New York v. Gebhardt, et al.*, 151 F. (2d) 802.)

6. The State acquired its lien under the provisions of the Grade Crossing Elimination Act (Chapter 233 of the Laws of 1926, superseded by Chapter 678 of the Laws of New York, 1928). (R. 88) The portions of that statute relative to the perfection of said lien by the State and the

provisions for notice contained in the statute are summarized below, (a) to (f), for the convenience of the Court. References are to sections and subdivisions as numbered in the Laws of 1928, Chapter 678.

(a) The Public Service Commission is required to designate a program of grade crossing eliminations pursuant to hearings held on due notice "to the department of public works, the counties and other municipal corporations in which [the] crossings are located and the railroad corporations operating the railroad crossed." The compiled order "shall be served upon the department of public works, the comptroller, the counties and the railroad corporations affected thereby." [Section 2(3)]

(b) Provision is then made for issuance of an elimination order after a hearing upon "such notice as the commission shall deem reasonable, of not less than ten days, to the department of public works and to such railroad corporations and counties as are required by law to bear part of the cost of the elimination. Notice shall also be given to such other municipal corporations and persons deemed by the commission to be interested in the proceeding." The elimination order is required to be served upon the department of public works, the railroad and the counties affected. [Section 2(5)]

(c) A statement of costs is required to be filed by the Comptroller with the Public Service Commission, the railroad and the counties. [Section 4(2)]

(d) The Act provides for a hearing before the Comptroller prior to issuance by him of a final determination as to amounts due, etc. Notice is required to be served "on the railroad corporation or corporations and the county or counties." The Comptroller is required to serve a written

statement of his final determination "on the railroad corporation or corporations and the county or counties." [Section 4(2)]

(e) Section 7 provides that upon the hearing of any claim filed under the Act, notice of such claim shall be given to "the railroad corporation or corporations and the county or counties bearing a part of the cost of the elimination. . . ."

(f) Section 10 gives the right to apply for a hearing or rehearing and the right to appeal to "Any person aggrieved by any order or decision" provided such person was "a party to such proceeding."

7. Neither Bankers Trust Company, as Trustee under the Debtor's Refunding Mortgage, nor The New York Trust Company as Trustee under the Debtor's General Mortgage, ever received notice of hearings before the Commission or the Comptroller, nor did such Trustees ever receive a copy of any list, program, order, statement or Comptroller's notice of determination. (R. 92-95)

8. Published notices of hearings before the Public Service Commission to determine the necessity for various grade crossing eliminations appeared in local newspapers circulating in upstate towns. (R. 88-90) No other notice by publication was ever given in connection with the grade crossing elimination projects along the Debtor's line of railway. (R. 90)

Specification of Error.

The Circuit Court of Appeals has erred in holding that the State's lien enjoys priority over the liens of the Debtor's Refunding and General Mortgages.

Reasons for Application for the Writ.

1. The question is one of general public interest. The extent to which private rights may be invaded by state governments and the application of constitutional limitations protecting those rights are matters which call for judicial clarification by this Court.

2. The decision of the Circuit Court of Appeals sustains the right of a state under its police power to enact retroactive legislation which destroys vested property rights long since acquired, without regard to the constitutional guarantees of due process and just compensation and contrary to the constitutional prohibition against the impairment by a state of the obligation of contract.

3. There is a conflict, therefore, between the decision of the Circuit Court of Appeals and repeated pronouncements of this Court holding that the exercise of the police power is subject to restrictions imposed by the Federal Constitution.

4. What the Circuit Court of Appeals held to be constructive notice (151 F. (2d) 804; R. 124) was not legal notice either to the Mortgage Trustees or the bondholders, and was therefore inadequate from a constitutional point of view.

5. The holding of the Circuit Court of Appeals (151 F. (2d) at p. 804; R. 125) that personal notices to the mortgagor were appropriate since the mortgagees may be deemed to have relied on the mortgagor for the protection of their interests is unwarranted.

(a) Such reliance by the Mortgage Trustees would constitute a dereliction of their duty to the bondholders (mortgagees) which finds no basis in fact and which cannot be implied in law.

(b) Even if the Mortgage Trustees did, in fact, rely upon the mortgagor to protect the interests of the bondholders, notice to the mortgagor would not satisfy the requirements of due process guaranteed by the Constitution.

WHEREFORE, Petitioners respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered on its docket No. 45, and that the order of the United States Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court, and that Petitioners have such other and further relief in the premises as to this Honorable Court may seem just.

Dated, January 31, 1946.

BANKERS TRUST COMPANY, as Trustee,

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THE NEW YORK TRUST COMPANY, as Trustee,

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